

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

75-1412

To be argued by
JOEL A. BRENNER
(20 minutes)

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-1412

UNITED STATES OF AMERICA,

Appellee,

—against—

JOHN CAPUTO,

Appellant.

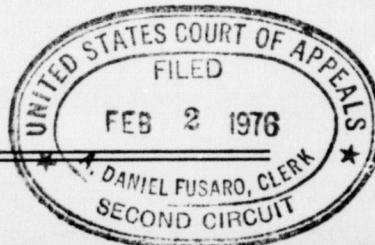
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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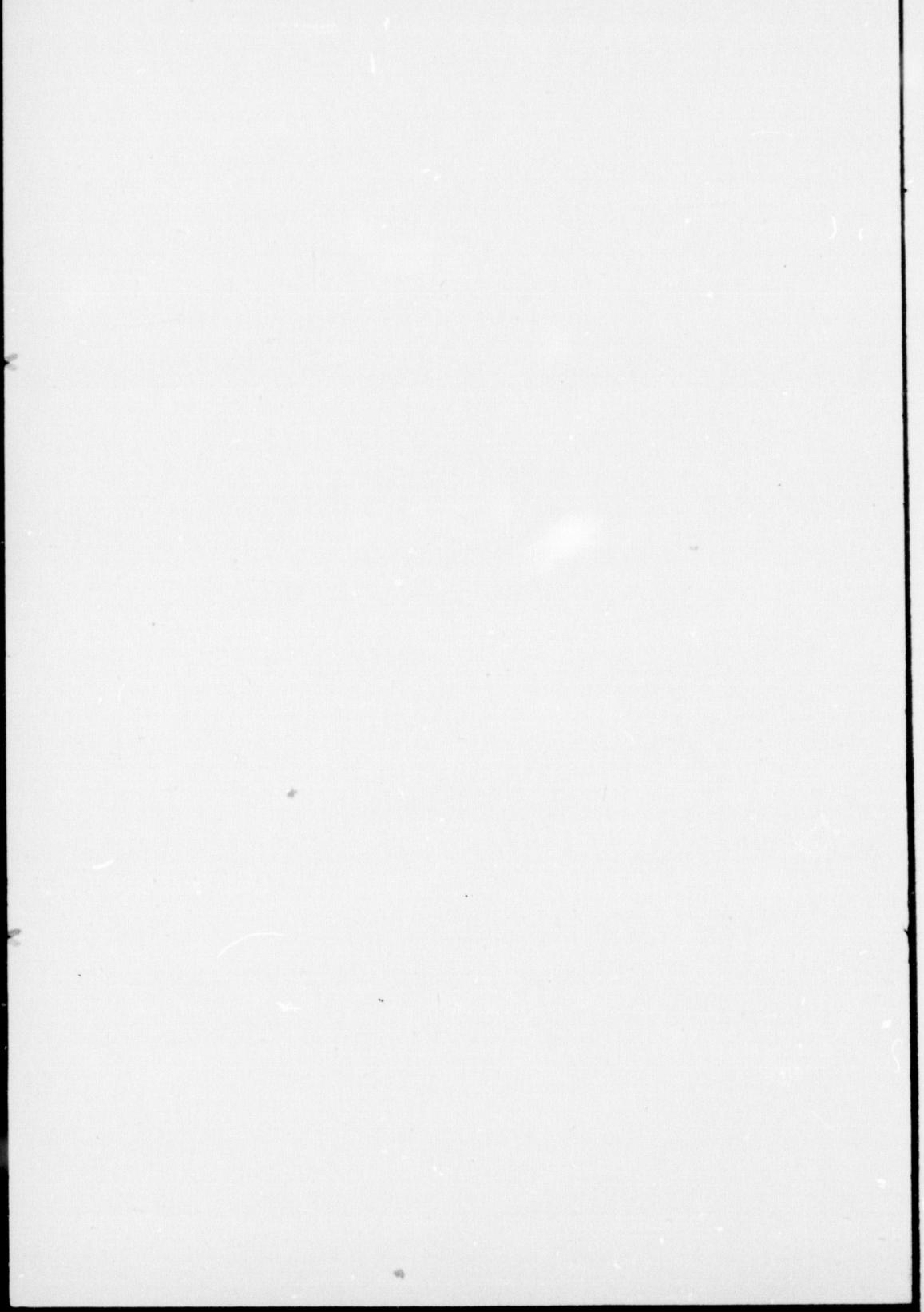


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—*against*—

JOHN CAPUTO,

Appellant.

BRIEF FOR APPELLANT

Preliminary Statement

Indictment 74 Cr. 621 charged appellant with four counts of perjury before a Grand Jury, 18 U.S.C. 1623.

This is an appeal, pursuant to *United States v. Beckerman*, 516 F.2d 905 (2d Cir. 1975), of an order of the Hon. Henry Bramwell, D.J., E.D.N.Y., entered November 24, 1975, denying appellant's motion to dismiss the indictment on the ground of double jeopardy.

Appellant has been continued on bail pending appeal.

Summary of Argument

Appellant was charged with four counts of perjury under 18 U.S.C. § 1623.

Prior to trial a motion was made to dismiss the first two counts on the ground of immateriality. Although

the judge denied the motion on the ground that this was a matter to be decided during trial, he reminded the government just prior to its opening that it had the burden of proving materiality.

The government had, perhaps, even more serious problems with the latter two counts of the indictment. By their own admission, their most important witness (Joseph Sciaffino) had indicated quite clearly that he had no intention of testifying at any trial. He had evaded service of a trial subpoena, had had to be arrested as a material witness, had stated by himself and through his attorney that he would not testify, and had disappeared the day before trial. The government had asked for a continuance, but had been turned down.

With the above as background, the government made its opening statement. Twice within the first 10 pages of the opening the prosecutor (Special Assistant United States Attorney Richard Shanley) was criticized by the court for making improper and erroneous statements. Less than three pages later he made the following incredible statement to the jury:

"He [appellant] was asked to take a lie detector test and he refused" (Mins. 11/16/75 at 87) (A.).*

A mistrial was then granted and when the court indicated it would retry the case, a motion was made to dismiss on double jeopardy grounds. The motion was denied and this appeal followed.

Appellant contends that the motion should have been granted for any one of three reasons: (1) The actions of the prosecutor were deliberately designed to provoke

* Page references preceded by "A" are to the Appellant's Record on Appeal.

a mistrial (because of the weakness of his case and the absence of a crucial witness) and the Government has forfeited its right to retry appellant, (2) Assuming, without conceding, that these actions were not deliberate, they were the legal equivalent thereof, i.e., the statements in the opening were so grossly erroneous that even if made in ignorance there may not be a retrial; and (3) Assuming, without conceding, that the statements were neither deliberately made nor grossly erroneous, there was no "manifest necessity" for a mistrial, and its erroneous declaration, without an exploration by the court of alternatives, similarly bars retrial.

Statement of Facts

In October 1974 appellant was indicted on four counts of perjury (74 Cr. 621). The first two counts alleged that he lied when he denied making certain statements to F.B.I. agents about alleged pay-offs to New York City Police Department personnel. The latter two counts alleged that he had lied when he denied two conversations with a policeman named Joseph Schiaffino (A. 5-10).

Numerous pre-trial motions were made and denied.* One such motion was to dismiss counts one and two on the ground that the matters referred to were not material to a valid subject of inquiry before the Grand Jury. Although the motion was denied as premature, just prior to the government's opening the court reminded the prosecutor:

"I might say, Mr. Shanley in connection with the Government's case and on the issue of materiality,

* The merits of these denials will not be considered in this Brief because of the limited nature of the appeal under *Beckerman*. The motions will only be referred to as they bear on the double jeopardy issue.

I am sure you are aware that the Government must prove materiality as part of its direct case." (Mins. 11/6/75 at 52) (A. 48).

The Government's case on counts three and four was, if anything, on shakier ground. The most important, if not the sole, witness against appellant on these counts was Joseph Schiaffino.

Although he did testify before the Grand Jury, shortly thereafter he began a series of actions which led even the prosecutor to believe that he would not testify at any trial. In January 1975, as the tentative trial date approached, the prosecutor called Schiaffino's home several times; the calls were not only not returned by Schiaffino, but his wife, who took the calls, berated the prosecutor for "harassing" her husband.* The prosecutor therefore had a trial subpoena prepared but Schiaffino evaded service on four separate occasions. In response to an F.B.I. agent's request to personally interview him, Schiaffino responded that he "knew his rights, and did not have to talk to anyone if he did not want to".

On February 19, 1975 the prosecutor finally spoke to Schiaffino by phone and told him that a warrant would be issued for his arrest if he "continued to evade service". Schiaffino responded by refusing to reveal his whereabouts and threatened to "disappear for a long time."

Apparently the prosecutor believed that Schiaffino would carry out his threat to disappear because he immediately filed a complaint and obtained an arrest warrant which was executed the same day when Schaffino

* The basis of this information is Mr. Shanley's own affidavit in support of an arrest warrant for Schiaffino dated 2/19/75 (A. 16-20).

was taken into custody and released on his own recognizance (A. 21).*

While Schiaffino had been evading service of the subpoena the prosecutor had taken other steps to attempt to secure his testimony. Washington had approved the prosecutor's request for authority to ask for an order granting Schiaffino use immunity on the ground that he was a material witness and "upon information and belief, the [prosecutor] and other governmental agents anticipate that he will invoke his Fifth Amendment privilege". On February 20th Judge Bramwell granted the requested order (A. 22).**

On February 24th, Schiaffino appeared before Judge Bramwell, and his attorney agreed to make him available on two hours telephone notice (Mins. 2/24/75 at 34-36) (A. 25).

After numerous motions, hearings and adjournments, a jury was picked and sworn on November 5, 1975. The prosecutor then announced that Schiaffino had left his house, that neither his wife nor his attorney could locate him, and that he was "seeking once again to avoid testifying"; the prosecutor pointed out that Schiaffino "knew that this trial was imminently scheduled for trial", indicating that the disappearance was wilful (Mins. 11/5/75

* The Magistrate's record of this matter (75 M 279) states that the complaint was made and the warrant issued on February 18 (A. 15), indicating the prosecutor anticipated that Schiaffino might flee before he even said so. Whichever date is correct, the fact remains that at some point the prosecutor believed Schiaffino might not appear.

** It is interesting to note that the prosecutor's trial brief, filed the following day, included an entire section on the "hostile Witness", even though Schiaffino no longer had any legal right not to testify. This further evidences the government's concern that Schiaffino would not testify.

at 33, 36) (A. 28, 31). The prosecutor then asked "for a few days" because Schiaffino was "perhaps the most important witness on Counts three and four" but the court responded:

"What you will do, you will go forward with whatever proof you have and when you get to that point where you are on Counts 3 and 4 and he is unavailable, then you'll make whatever application is necessary under the circumstances. That's the way it will be done" (Mins. 11/5/75 at 40-41) (A. 35-36).

When defense counsel sought to learn whether the court would grant a continuance if the prosecutor asked for it, the court refused to say and replied:

"The case is just going to go forward" (Mins. 11/5/75 at 42) (A. 37).

Shortly thereafter, the court issued a bench warrant for Schiaffino when the prosecutor stated "[w]e do intend to put Mr. Schiaffino on the stand *tomorrow*" (Mins. 11/5/75 at 49) (A. 44) (emphasis added).

The following day the prosecutor announced that Schiaffino had still not been located and the court said:

"We are going to proceed and we will get to that when you want to get to it. That is up to you" (Mins. 11/6/75 at 55) (A. 51).

Against this background the prosecutor committed three errors in his opening:

1. The prosecutor began reading the indictment and when defense counsel objected to the reading of counts three and four the following colloquy occurred:

"(Side bar follows.)

Mr. Gallina: If your Honor please, if you recall prior to the trial, I moved to have your Honor restrict the Government from presenting in its opening statement certain materials that it knows it cannot present during the trial.

The Court: You did.

Mr. Gallina: And that I asked your Honor to also not permit the reading of two counts of that indictment as being inflammatory and prejudicial because the Government well knows it has no evidence to support those counts.

It is apparent that the Government is again going to read that same indictment which contains—I believe, according to a plot and a plan by the Government, the recited testimony from the Grand jury, of a witness who they know will not testify in this court and will not testify to those matters in this Court.

The Court: You mean, Counts 3 and 4?

Mr. Gallina: Yes. Just for the purpose of again emphasizing that testimony in the Grand Jury to this jury. I'd ask your Honor again to restrict and order the Government from not reading these counts to the jury and not reading that testimony to the jury.

The Court: Mr. Shanley?

Mr. Shanley: Your Honor, the Government intends to prove these four counts. Because the—a witness—a witness right now is a fugitive. We fully expect to apprehend him and have him here to testify and as your Honor pointed out, it is the witness' decision whether or not he's going to testify or not when he gets on the stand and under oath.

The Government has no reason at this point, the witness having testified once before the Grand Jury, that he is now not going to, except on the statements from his attorney. We can't be bound by what the attorney says. We have to prove our case.

Mr. Gallina: The witness appeared with his attorney in this courtroom and stated both to Mr. Shanley and to myself that he is not going to testify in this case in the fashion in which the Government wishes him to. He's not going to do that.

Mr. Shanley: That's the chance the Government will have to take.

The Court: The Court feels that possibly a re-reading of the indictment might be inflammatory and it might be prejudicial and the Court will restrict the Government to a statement by Mr. Shanley of what the Government intends to prove and the Court will request that the Government do not go through the indictment and read the indictment as part of its opening." (Mins. 11/6/75 at 62-64) (A. 59-61).

The court was thus able to partially obviate the first error of telling the jury about counts that could not be proven.

2. A few pages later the prosecutor stated that a 1971 gambling charge against appellant (which formed the background of the alleged bribery out of which this entire case arose) had been dismissed because it was a "very, very weak case". Another side-bar was held at which defense counsel accused the prosecution of implying that the charges had been dismissed on a technicality, "in the face of its full knowledge that the defendant was innocent in that case and that the charges were dismissed

... because he was innocent . . ." (Mins. 11/6/75 at 70-71) (A. 67-68).*

The prosecutor responded that appellant's own Grand Jury testimony was that the charges were dismissed because the evidence was weak. Defense counsel then read appellant's Grand Jury testimony in which appellant stated that the bribery charge was "a lie, lie, lie," and the arrest was "bad", a "phony" and a "frame". When the court said to the prosecutor "That isn't what you told the Court", the prosecutor retreated and said "I said that the agents will testify [Appellant had said the case was weak.]" The court said "That is not a proper basis for the statement that you made before this jury . . . They might testify to that, but you would have to put it in that particular way exactly." The prosecutor agreed that he had been in error and asked for "advice" as to how to proceed with this matter in its opening. The court said no reference at all could be made to this and instructed the jury that appellant was to be considered innocent of the gambling charge (Mins. 11/6/75 at 71-85) (A. 68-82).

3. Less than three pages later the prosecutor made the last and worst error. Because of the importance of this issue to the appeal counsel is taking the liberty of setting forth the entire relevant colloquy:

"Mr. Shanley: He was asked to take a lie detector test and he refused.

Mr. Gallina: Your Honor, may we approach the bench?

The Court: Come up.

* The obvious benefit the prosecutor sought to derive from this mis-statement was that someone who is guilty, even if the case against them *may* be dismissed because it is weak, is more likely to seek to bribe someone than a person who knows he is completely innocent.

(The following occurred at side bar without the hearing of the jury.)

Mr. Gallina: Your Honor, I now move for a mistrial. I don't need to say anything more.

Mr. Gallina: Your Honor, may I make a statement?

In all the years that I have practiced before the Federal and State benches, I have never, never, never seen such an example of devious and despicable trial tactics as I have just seen happen before this jury.

That question of his having been asked to take a lie detector test, whether it is true or isn't, is one that has no relevancy whatsoever to the issues before this Court, none, none. It can't even be reasonably argued.

*Your Honor, for counsel to do this without making either the defense or the Court aware of what he was going to do is certainly more than ample proof of the fact that the prosecution knew that that was what he was going to do and was absolutely despicable.**

I don't think under the laws and the cases, I don't think that there is any support whatsoever in any fashion for any such statement and I move for a mistrial.

The Court: Yes, Mr. Shanley.

Mr. Shanley: Your Honor, counsel has been in possession of these statements for nigh over a year now.

* Particularly since the prosecutor had sought the court's advice on how to proceed after his last error (Mins. 11/6/75 at 81) (A. 78).

The Court: Yes, but, Mr. Shanley you seem to think that because an FBI agent has said something or has done something, that on the basis of his act, you have a right to make out a case against the defendant.

The defense's position is perfectly correct here, and you don't have a right to do that.

Mr. Shanley: Your Honor, I was interrupted in my statements. I was going to say that he had no faith in a lie detector test and he was willing to go before a priest.

The Court: That does not give you the right under these circumstances.

In making your opening, you have to present what is credible evidence, credible proof and something which goes directly to the indictment which is before the court.

You are not trying Mr. Caputo's credibility in an opening statement, and that is what you seem to be doing, and that is not the purpose of your opening statement, to try Mr. Caputo's credibility.

Mr. Shanley: Your Honor, I was not. I was simply relating what is going to be testified to.

The Court: Well, I will tell you now if you continue to do this I must grant a mistrial, and if you don't know what you are doing, you had better sit down a few minutes and look.

I will take five minutes.

(Recess.)

The Court: Mr. Gallina, make your motion.

Mr. Gallina: Your Honor, at this time the defendant moves for a mistrial and the withdrawal

of a juror on the grounds that the error by the prosecution, the statement by the prosecution has so prejudiced the jury, or possibly prejudiced the jury that the defendant could not have a fair trial.

The Court: Mr. Shanley.

Mr. Shanley: Your Honor, I am well aware that evidence—that polygraph tests are inadmissible in Federal Courts. But I have—I did some research on this problem and I didn't find any cases which said that a statement as to whether or not a person would take a polygraph test is inadmissible, whether he would or he would not. I think there is a distinction here as to the results of the test, no question about it, although there is—Mr. Branch is getting a case for me, a District Court case in Michigan, in which it was admitted into a Federal Court, the results of a polygraph test.

I think there is a distinction here, and under the circumstances, when it was qualified, the question was asked and he came back and said, "I'll do this and I'll do that, but I have no reliance on this."

This is not—this is not error Your Honor, in the sense that it's inadmissible evidence, because there doesn't seem to be any law as to whether that question—the fact that the question was asked can be admitted into evidence. It just doesn't seem to have come up.

I have some cases here and I was looking for that point.

The Court: Anything further, Mr. Gallina?

Mr. Gallina: Your Honor, insofar as just the rationale, it's obvious that the evidence could not

have been offered even in cross-examination of my client. The evidence in the statement, or the purported evidence in the opening statement was offered in such a fashion by the prosecution, well knowing that it had no relevancy or bearing upon any of the issues in this case, and it was done only, only, obviously, for the purpose of prejudicing this jury, convincing this jury that this man is really guilty; if he weren't guilty of the underlying crimes and everything else that is happening in this case, he would have taken a lie detector test.

That is the clear message to the jury and especially now, even if it is not brought out in evidence, it is known to the jury he refused to take a lie detector test.

There is just no way of curing it, your Honor.

Mr. Shanley: Your Honor, I disagree. I would certainly disagree with Mr. Gallina that it was an effort on the part of the Government to prejudice the jury.

The Court: The Court feels it's highly prejudicial, and the motion for the withdrawal of a juror and the declaration of a mistrial by the defendant is granted.

Mr. Shanley: You won't wait until I get that case, Your Honor?

The Court: The motion is granted, counselor." (Mins. 1/6/75 at 87-94) (A. 84-91) (emphasis added).

The case was put over until 2 p.m. at which time defense counsel called the judge's chambers and advised him that a double jeopardy motion would be made; it was agreed to hear it on Monday, November 10. (Mins. 11/6/75 at 96, Mins. 11/10/75 at 3-4) (A. 93, 120-121).

On November 7, 1975 Schiaffino appeared with his counsel who argued that the bench warrant should be vacated because Schiaffino's non-appearance had not been intentional and because Schiaffino had said he would appear. The prosecutor argued that there was a serious question as to both of these matters and asked that Schiaffino be remanded. The court refused to go into these issues and vacated the warrant (Mins. 11/7/75 at 1-8) (A. 95-102).

On November 10 the motion to dismiss (A. 103-117) was argued. It was contended that the prosecutor had deliberately provoked a mistrial in order to gain extra time to locate the missing witness Schiaffino and had, thereby, forfeited the right to retry appellant. Alternatively it was argued that the prosecutor's actions were so grossly negligent, even if not deliberate, as to bar a second trial. (Mins. 11/10/75 at 6-19) (A. 123-136). The prosecutor denied deliberately provoking the mistrial and said that appellant had consented to the mistrial (Mins. 11/10/75 at 19-25) (A. 136-142). Defense counsel responded that it had made the motion to protect appellant's rights and that this was not a consent to a retrial nor waiver of double jeopardy (Mins. 11/10/75 at 25-27) (A. 142-144).

With regard to the fact that defense counsel asked for the mistrial, the court said:

"The reason he [made] the motion is because your actions in your opening was [sic.] so highly prejudicial that in good conscience for the benefit of his client he was required to do this" (Mins. 11/10/75 at 22) (A. 139).

With regard to the issue of the prosecutor's acts, the court said:

"From watching the Government, and the Court's position as an observer, it doesn't appear

to me that you deliberately did this. I think you had good intentions but that wasn't the way it came out. I think you were completely wrong in what you did. There is no question in my mind. I do not think you did it deliberately.

* * * * *

I would say if this were the second occasion of repeating the same kind of action by the Government, I would have to give great weight to what you are saying" (Mins. 11/10/75 at 23, 27) (A. 140, 144).

The Court's formal decision denying the motion was as follows:

"Defendant John Caputo moves to dismiss the indictment on the ground that further proceedings are barred by the Double Jeopardy Clause of the Fifth Amendment.

After numerous adjournments the trial of this case commenced on November 3, 1975, at which time a jury was duly impaneled. During the course of the prosecutor's opening statement on November 6, 1975, this Court granted defendant's motion for a mistrial. Defendant now argues that the prosecutor deliberately committed error in his opening statement with the intention that the Court would be forced to declare a mistrial. Defendant contends that the intent of the prosecutor was to obtain a 'post-jeopardy continuance' in order to strengthen his case and that, therefore, the Double Jeopardy Clause bars reprocsecution.

As this Court declared a mistrial upon the explicit motion of defendant's counsel, the Double Jeopardy Clause does not bar the government from retrying the defendant. *United States v. Jorn*, 400 U.S. 470, 485, 91 S. Ct. 547, 557, 27 L. Ed. 2d 543 (1971); *United States v. Tateo*, 377 U.S.

463, 467-468, 84 S. Ct. 1587, 1590, 12 L. Ed. 2d 448 (1964); *United States v. Goldstein*, 479 F.2d 1061, 1066 (2d Cir. 1973), cert. denied, 414 U.S. 873, 94 S. Ct. 151, 38 L. Ed. 2d 113. This was not a case of 'prosecutorial impropriety designed to avoid an acquittal'. *United States v. Jorn, supra*, 400 U.S. at 485 n. 12, 91 S. Ct. at 557. Although the prejudicial remarks in the prosecutor's opening statement demonstrated considerable ineptitude, this Court does not find them to be the product of a purposeful scheme designed to compel a continuance. The prosecutor has demonstrated nothing less than good faith throughout the proceedings in this case.

Indeed, he was willing to select another jury immediately after the mistrial was declared. Since this Court did not declare the mistrial *sua sponte*, it finds no need to discuss defendant's contentions regarding the 'manifest necessity' doctrine. See *Gori v. United States*, 367 U.S. 364, 81 S. Ct. 1523, 6 L. Ed. 2d 901 (1961); *United States v. Jorn, supra*; *Illinois v. Somerville*, 410 U.S. 458, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973); *United States v. Gentile*, — F.2d —, slip op. 239 (2d Cir. October 22, 1975)."

A R G U M E N T

POINT I

The retrial is barred by the double jeopardy prohibition of the Fifth Amendment.

(a) The declaration of mistrial was brought about by the deliberate misconduct of the prosecutor and the government has forfeited its right to retry appellant.

Under the federal system, a defendant is considered to have been placed "in jeopardy" once a jury has been impaneled and sworn. *United States v. Jorn*, 400 U.S. 470, 474-75 (1971). Therefore, although no trial testimony had yet been taken, the protection of the double jeopardy clause had attached to appellant.* *Ibid.* Accordingly, if the trial was aborted because of deliberate governmental misconduct, there may be no retrial. *Illinois v. Somerville*, 410 U.S. 458, 464 (1978); *United States v. Jorn*, *supra*, 400 U.S. at 485, n. 12; *United States v. Tateo*, 377 U.S. 463, 468 n.3; *United States v. Gentile*, *supra*, 525 F.2d at 257 n.3.**

* Although no trial testimony had been taken, the "length of [appellant's] exposure" to prosecution had been considerable. He had been under indictment for over 13 months, had sat through a 3 day suppression hearing (2/24-2/26/75), had participated in Jury Selection, and had heard two days of pre-opening colloquy. See *United States v. Gentile*, 525 F.2d 252, 256 n.2 (2d Cir. 1975).

** As the prosecutor (Memorandum of Law in Opposition to Motion to Dismiss Indictment at 5) (A. 156) and the court (Decision of 11/24/75 at 2) (A. 170) both recognized, if there is deliberate governmental misconduct "consent" does not remove the bar to reprocsecution. See above cited cases. See also *United States ex rel. Rogers v. La Vallee*, 517 F.2d 1330, 1334 (2d Cir. 1975); *United States v. Dinitz*, 492 F.2d 53 (5th Cir.), *aff'd. en banc*, 504 F.2d 854 (1974), *cert. granted*, 420 U.S. 1003 (1975).

As a matter of fact, all the parties agree that if the government deliberately caused the mistrial there may not be a retrial. During the argument on the motion to dismiss (Mins. 11/10/75 at 19-20) (A. 136-137), and in the Memorandum of Law in Opposition to the Motion to Dismiss Indictment (A. 156) the prosecutor conceded that if he deliberately provoked the mistrial, the retrial was barred.* In the decision denying the motion to dismiss the lower court impliedly agreed by stating that this was not a case of deliberately-caused mistrial. (A. 170). Hence, the focus must be on the correctness of the lower court's "finding".**

All of the facts point toward the deliberate provoking of a mistrial.

* Aside from a conclusory assertion that he had not deliberately provoked a mistrial, the only "fact" asserted in support of this was the prosecutor's statement that since he immediately stated "I am ready to pick another jury" he could not possibly have been seeking a post-jeopardy continuance to find Schiaffino. (Memorandum of Law in Support of Opposition to Motion to Dismiss at 8 (A. 159). This "fact" does not support the conclusion for two reasons: (1) it was only after defense counsel said he probably could not immediately retry the case that the prosecutor made this statement and (2) even if the process of picking another jury could be begun sometime Thursday afternoon no testimony could be taken until at least Friday and possibly Monday so he would have gotten his "continuance" in the process.

** During the argument on the motion to dismiss, when defense counsel argued that the prosecutor's actions had been intentional or grossly incompetent, the court said:

I would say if this were the *second* occasion of repeating the *same type of action* by the Government, I would have to give great weight to what you are saying" (Mins. 11/10/75 at 27) (A. 144) (emphasis added).

Since the prosecutor had committed *three* separate errors in his opening statement it is difficult to understand why the court wanted a "second" occasion of the "same type of action" before ruling it was deliberate or incompetent. In any event, the Fifth Amendment protects a defendant from *double*, not *triple*, jeopardy.

The government's case had been challenged on the ground that two of the counts were invalid due to "immateriality" and just prior to opening statement, the court had pointedly reminded the prosecutor that he had the burden of demonstrating materiality on his direct case. A witness essential to the government's case on the other two counts (Joseph Schiaffino), had made good his promise not to testify and had disappeared. This same witness had previously evaded service of subpoenas, had to be arrested on a material witness warrant, and had stated to the prosecutor that he would not testify. Of crucial importance is the fact that on the previous day the prosecutor, in asking for a continuance, had specifically stated that this witness would be called on *the first day of trial.**

Had the trial proceeded to the point where Schiaffino had to be called, and had the Court denied a continuance (as it had indicated it would), or if Schiaffino was still missing, a mistrial as to Counts 3 and 4 would have had to be declared which would have barred reprocsecution. Accordingly, he deliberately injected error into his opening to obtain a mistrial before that time was reached.

He first invited a mistrial by referring to what Schiaffino would testify to, though he knew Schiaffino was unavailable. The Court criticized him for attempting to put "inflammatory and prejudicial" information before the jury. He next told the jury that the underlying gambling charges against appellant had been dismissed because of insufficient evidence, thereby implying that appellant might still have been guilty; he did this despite the fact that appellant's Grand Jury testimony was that

* "Mr. Shanley: Now, Your Honor, we do intend to put Mr. Schiaffino on the stand *tomorrow.*" (Mins. 11/5/75 at 49) (A. 45).

the case was a "phony arrest". This is analogous to the bad faith of a prosecutor asking a defendant if he had committed a crime when he knew the defendant was innocent. *Cf. United States v. Beno*, 324 F.2d 582, 588 (2d Cir. 1963).

Shortly thereafter he told the jury appellant had refused to take a *lie detector test*. It is a horn-book law that the *results* of a lie detector test are inadmissible; even less defensible is reference to a *refusal* to take such tests, particularly when reference to such refusal borders on an impermissible comment on a defendant's right to remain silent. *Cf. United States v. Hale*, — U.S. —, 95 S. Ct. 2133 (1975).

Both the nature and number of these errors indicates that they were deliberately designed to provoke a mistrial.

In *Downum v. United States*, 372 U.S. 734 (1963) the prosecutor asked for and was granted a mistrial because some witnesses, essential to some counts but unnecessary for others, were unavailable. Although it was agreed that this unavailability was the result of "excusable oversight" the mistrial was held to have barred reprocsecution. *Cornero v. United States*, 48 F.2d 69, 71 (9th Cir. 1931) was held to state the "governing principle":

"The fact is that when the district attorney impaneled the jury without first ascertaining whether or not his witnesses were present, he took a chance.* While their absence might have justified a continuance of the case in view of the fact that they were under bond to appear at that time

* Co-incidentally, when defense counsel reminded the prosecutor that Schiaffino had said he would not testify the response was "That's the *chance* the Government will have to take" (Mins. 11/6/75 at 63) (A. 60) (emphasis added).

and place, the question presented here is entirely different from that involved in the exercise of the sound discretion of the trial of justice. The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy."

Even the dissent in *Downum* would have upheld the double jeopardy claim if there had been any "indication that the prosecutor's explanation was a mere cover for negligent preparation or that his action was in any way deliberate". 372 U.S. at 742.

In *United States v. Glover*, 506 F.2d 291 (2d Cir. 1974) the Court had to decide if a defendant could be reProsecuted after a mistrial declared because the prosecutor belatedly advised the trial court it wanted to use statements of the defendant which implicated his co-defendants. The Court held that a retrial was impermissible in language strongly applicable to this case:

"The District Court understood that double jeopardy normally attaches upon the empaneling of a jury competent to try the defendant, for it is then that a defendant is 'put in jeopardy.' *Illinois v. Somerville*, 410 U.S. 458, 467, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973); *United States v. Jorn*, 400 U.S. 470, 479, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971); *Green v. United States*, 355 U.S. 184, 188, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957); *Wade v. Hunter*, 336 U.S. 684, 688, 69 S. Ct. 834, 93 L. Ed. 974 (1949); *Kepner v. United States*, 195 U.S. 100, 24 S. Ct. 797, 49 L. Ed. 114 (1904).

Having been 'put in jeopardy', the defendant is thought to have the right to seek a favorable verdict from the jury which he has accepted as

satisfactory.* See *United States v. Jorn, supra*, 400 U.S. at 486, 91 S. Ct. 547; *Downum v. United States*, 372 U.S. 734, 736, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963); *Wade v. Hunter, supra*, 336 U.S. at 689, 69 S. Ct. 834. The negative reason for this solicitude is that to permit the trial to be aborted might lead to mistrials covertly for the benefit of a prosecution that needs strengthening. See e.g. *United States v. Kin Ping Cheung*, 485 F.2d 689, 691-692 (5th Cir. 1973). A mistrial can operate 'as a post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case.' *Illinois v. Somerville, supra*, 410 U.S. at 469, 93 S. Ct. at 1073 (per Rehnquist, J.), citing *Downum v. United States, supra*." (*Id.* at 294).

Since under *Downum* double jeopardy would have prevented a retrial if the mistrial had come during the presentation of evidence, the prosecutor deliberately tried to have the Court declare a mistrial *before* that time. Although the prosecutor was ultimately successful in his nefarious scheme he should not be allowed to benefit thereby. The double jeopardy clause

"prevents a prosecutor . . . from subjecting a defendant to a second prosecution by discontinuing the trial when it appears the jury might not convict". *Green v. United States, supra*, 355 U.S. 184, 188 (1957).

See, also, *United States v. Gori*, 282 F.2d 43, 48 (2d Cir. 1960), *aff'd* 367 U.S. 364 (1961): "The situation [of unintentional prosecutorial error] was quite unlike the

* As was pointed out during argument on the motion to dismiss "Mr. Caputo himself was totally satisfied with the jury and wanted that particular jury" (Mins. 11/10/75 at 26) (A. 143).

more troublesome problems found in various of the cases, as where the prosecution desires to strengthen his case on a new start or otherwise provokes the declaration of mistrial . . .".

Or, to paraphrase the dissent in *United States v. Tateo*, *supra*, 377 U.S. at 473:

"The *purpose* of the prosecutorial misconduct in this case was to deny him the right to have the impaneled jury decide his fate, whereas this was merely the effect of the prosecutorial negligence in *Downum*".

In *United States v. Jorn*, *supra*, it was stated that:

"The trial judge must recognize that lack of preparedness by the Government to continue the trial directly implicates policies underpinning both the double jeopardy provision and the speedy trial guarantee". 400 U.S. at 486.

See, also, *McNeal v. Hollowell*, 481 F.2d 1145, *rehearing and rehearing en banc denied*, 481 F.2d 1156 (5th Cir. 1973) (Where prosecutor "nolled" a case after a witness did not testify, double jeopardy barred a retrial).

It is true that the lower court stated that it did not believe the prosecutor had deliberately provoked a mistrial. However, it is respectfully submitted that this finding is clearly erroneous in view of the record. Alternatively, it was based on insufficient information and the case should be remanded for a hearing. The development of the facts on issues such as (a) the prosecutor's research on the admissibility of lie detector references, (b) his preparation of the case, and (c) any steps he took to obtain the presence of Schiaffino between November 5th and November 6th, should have taken place at an adversary hearing. Cf. *United States v. Hilton*, 521 F.2d

164 (2d Cir. 1975) (Determination of whether government deliberately suppressed or inadvertently failed to disclose favorable evidence must be made at a hearing). While the lower court judge may sit as a fact-finder, this should take place in a due process proceeding. The determination of this important issue should not be made, as it was here, in an *ex parte* manner by the court acting "as an observer."

(b) The declaration of mistrial was brought about by the gross incompetence of the prosecutor and the government has forfeited its right to retry appellant.

Assuming, without for an instant conceding, that the prosecutor did not deliberately provoke a mistrial, he nonetheless brought it about because of his gross incompetence. The harm to the appellant remains the same (loss of the jury he desired, an extension of the time he is subject to the anxieties of prosecution, and reprosecution after jeopardy attached). Accordingly, the result should be the same, *i.e.* dismissal of the indictment.

The mistrial in this case was brought about by the combined effect of three egregious errors in the prosecutor's opening * (See, *supra*, pp. 6-13). The reference to testimony of a witness who would probably not appear was bad. Implying that the defendant, who had protested his *innocence*, had really admitted he might have been *guilty*, was worse. But worst of all was an error which a first year law student would not commit—** telling the jury that appellant had *refused* to take a lie detector test.

* Of course, the egregious nature of these errors also is an indication they were deliberately made. See Point I(a).

** Mr. Shanley is a middle-aged Strike Force Special Attorney.

Appellant recognizes that not every commission of an unintentional error by the prosecutor which results in a mistrial will constitute a bar to reprocsecution. *Gori v. United States*, 367 U.S. 361 (1961). But appellant contends that there are some errors which are so outrageous that they are the legal and functional equivalent of deliberate action.*

In *United States v. Gentile, supra*, a mistrial was declared because of statements perceived to be error in a prosecutor's opening (anticipation of an entrapment defense). A double jeopardy claim was rejected under *Gori* but the Court did hint that there might be errors which, though unintentional, were so outrageous as to bar reprocsecution after a mistrial:

"As Judge Gurfein pointed out [in *United States v. Glover*], 506 F.2d at 298, the inadmissible statement was the functional equivalent of the missing witness in *Downum v. United States, supra*, 372 U.S. at 735 . . ." 525 F.2d at 258.

Here, as in *Glover*, because of "sloppy prosecutorial preparation" (*McNeal v. Hollowell, supra*, 481 F.2d at 1151), inadmissible statements (albeit in openings rather than during testimony) are the functional equivalent of the missing witness in *Downum*.

The prosecutor in this case had been criticized twice already in his opening before he made the lie detector reference. Despite this, he did not even make counsel or the court aware that he intended to make this treacherous reference.

* For the same reason that "consent" to a mistrial does not remove the bar to reprocsecution where the mistrial has been deliberately provoked, it does not waive that bar where the mistrial was the result of the prosecutor's gross incompetence. See p. 17, *supra*.

He said he had done some research on the issue and had not found any cases which said that a statement that a person had refused to take a lie detector test was inadmissible (Mins. 11/6/75 at 92-93) (A. 89-90). It is not clear whether he meant he had done this research before his opening or during the recess the court took while considering the mistrial motion. If he had really done any effective research he would have found *United States v. Bando*, 244 F.2d 833, 841 (2d Cir. 1957) where this Court held that statements of *refusal* to take lie detector tests are error because evidence of the *taking* of such tests is inadmissible.* See, also, *United States v. Hart*, 344 F. Supp. 522, 524 (E.D.N.Y., 1971) ("[T]he court considers itself bound by . . . a definite statement of the Second Circuit that such tests are not admissible. *United States v. Bando . . .*").**

The lower court itself came within a hair's breadth of labeling the prosecutor's acts gross incompetence.

When the prosecutor began to refer to testimony that might never be given, the court criticized him on the ground such a reading might be "inflammatory and prejudicial" (Mins. 11/6/75 at 63-64) (A. 60-61). The court next criticized the prosecutor for setting forth as fact what an agent would merely testify to, and for misstating appellant's Grand Jury testimony (Mins. 11/6/75 at 76-82) (A. 73-79).

* It is true that *Bando* holds that such references are not always *reversible* error, but that is irrelevant for present consideration. If the prosecutor knew of this case before his opening (which he has denied) then he deliberately injected error into his opening; if he did not know of it he was incompetent. In either case the government should suffer the consequences.

** Both of these cases and a legion of others could have been found by looking in the descriptive-word index of *Modern Federal Practice Digest* under "Lie Detector" and "Lie Detector tests" and reading the cases under Criminal Law §§ 388, 730(8) and 1169(5).

During the colloquy following the lie detector reference the Court said:

"Well, I will tell you now if you continue to do this I must grant a mistrial, and if you don't know what you are doing, you had better sit down a few minutes and look" (Mins. 11/6/75 at 90) (A. 87).

During the colloquy on the motion to dismiss the court told the prosecutor:

"I do not feel that was your attitude [to deliberately provoke a mistrial]. It didn't show anything of that nature. It showed something else, but I do not feel you deliberately provoked it.

* * * * *

"[Y]our actions in your opening was [sic] so prejudicial . . .

* * * * *

"I think you were completely wrong for what you did."

* * * * *

"You know I can't go along in an opening and make appropriate instructions for obvious mistakes which you make. I gave an appropriate instruction for the second mistake which you made. But I can't continually use this as a way of running a court. And don't you expect that I will have to, because you must expect that you will present your case properly and that the court will not be required to intervene or to more or less prohibit the prejudice which you inject into a situation.

* * * * *

"And under no circumstances should you feel that I can continually give instructions in order to correct mistakes which you make and you

should expect that that is the way I will do things." (Mins. 11/10/75 at 20, 22, 23, 24) (A. 137, 139, 140, 141).

Finally, in his decision the Court said:

"[t]he prejudicial remarks in the prosecutor's statement demonstrated *considerable ineptitude*." (emphasis added.)

In a different context this Court has said that the deliberate suppression of evidence is equivalent to the ignoring of such evidence if the evidence was of such high value that it could not have escaped the notice of the prosecution. *United States v. Hilton*, 521 F.2d 164, 166 (2d Cir. 1975).* By analogy the ignorant injection of error into an opening is the equivalent of the deliberate injection of such error where the potential for prejudice is so high that it could not escape the attention of the prosecutor. Since that is what happened here there may be no prosecution.

(c) There was no "manifest necessity" and the declaration of a mistrial was an abuse of discretion which bars a retrial.

Assuming, again without conceding, that this Court finds that the prosecutor's errors were neither deliberate nor due to gross incompetence, such a finding must be based on a determination that these errors were not so outrageous as to require the declaration of a mistrial.

* While the relief mandated in *Hilton* was said to be a new trial, that was only because the error was first discovered on appeal. If the deliberate suppression of evidence, or its equivalent, is discovered during trial, the remedy would be a dismissal of the indictment, with prejudice, thereby barring a new trial. See, e.g., *United States v. Ellsberg*, not officially reported, N.Y. Times, 5/12/73, p. 15 col. 5-8.

In other words, there was no "manifest necessity", the declaration of a mistrial was an abuse of discretion and the double jeopardy clause prohibits a retrial.

In *United States v. Gentile*, *supra*, 525 F.2d at 257 this Court read *United States v. Jorn*, 400 U.S. 470, 483 (1971) as announcing a:

"per se rule that when the aborting of a criminal trial was an abuse of discretion, a double jeopardy defense would prevail even if the judge's sole intention was to benefit the defendant."

In *United States v. Bando*, 244 F.2d 833 (2d Cir. 1957) the Court dealt with a situation somewhat analogous to that here. The relevant portion of the opinion reads as follows:

"Agent Bracken testified that Leo after first agreeing to take a lie detector test, later refused. The judge sustained an objection to the latter part of the answer on the grounds that 'There is a difference of opinion as to the scientific validity' of such a test. Such proof is generally considered inadmissible. *Tyler v. United States*, 90 U.S. App. D.C. 2, 193 F.2d 24. The trial court's statement put its finger on the disbelief, not only of scientists, but of people generally that such tests are reliable. The court in ruling on that part of Bracken's testimony and in making the above quoted statement, avoided any unfavorable inferences."

Accordingly, *Bando* may be cited as holding that references to refusals to take lie detector tests are error, but that such error can be cured by timely action of the trial court. If this reading of *Bando* is adopted, then there was no "manifest necessity" (*United States v. Perez*, 9 Wheat. [22 U.S.] 579 [1824]), the declaration of a mistrial was an abuse of discretion, and there can be no retrial.

The government will, no doubt, contend that defense counsel requested the mistrial and consented to it, and, therefore, that appellant is barred from claiming double jeopardy. There are several separate, but related, answers to this contention.

Firstly, since, under *Jorn*, appellant had a constitutionally protected right to the first jury, counsel could not give that right away without appellant's consent. *Cf. Brookhart v. Janis*, 384 U.S. 1, 7 (1966). Not only was appellant not queried by the court as to whether he wanted to give up his right to that jury, but he specifically stated that he wanted it.

Secondly, where a judge decides to declare a mistrial he may do so "without the defendant's consent and even over his objection." *Gori v. United States*, 367 U.S. 364, 368 (1961). In other words, the issue of consent is irrelevant and what is relevant is whether the judge was correct in declaring the mistrial.

This was the approach taken by the Fifth Circuit in *United States v. Dinitz*, 492 F.2d 53, *aff'd en banc*, 504 F.2d 854 (1974), *cert. granted*, 420 U.S. 1003 (1975).* In that case the trial judge dismissed the defendant's trial counsel, and substitute counsel, with defendant's consent, moved for a mistrial, which was granted. On retrial the defendant was convicted but the Fifth Circuit set aside his conviction on the ground that there had been no manifest necessity and that his "consent" did not remove the bar to reprocsecution.

The majority opinion held that the trial court's action in dismissing trial counsel (based on non-compliance with certain directions of the court) was erroneous because

* For summary of oral argument see 18 Cr. L. Rptr. 4111.

there were alternatives to such action which would have cured any prejudice the court felt had occurred (citing *Jorn and United States v. Cheung*, 485 F.2d 689 [5th Cir. 1973]). Since it was the erroneous action of the court which brought about the mistrial request, the defendant could "hardly be said to have relinquished voluntarily his right to proceed before the first jury". *Id.* at 59;

"However the mere fact of consent does not have such talismanic qualities that 'mere mouthing' of the (mistrial motion) in open Court constitutes in every case waiver of a subsequent plea in bar." *Id.* at 52.*

Here, although the prosecutor's, and not the court's, action led to the problem, the court failed to explore the possibility of a curative charge (suggested by the prosecutor and approved by this Court in *Bando*), replacement of the government prosecutor, or some other action less drastic than retrial. Accordingly, the request for a mistrial did not waive the bar to reprocsecution. See, also, *McNeal v. Hollowell*, *supra*.

* See, also, *United States ex rel. Rogers v. La Vallee*, 517 F.2d 1330, 1334 (2d Cir. 1975).

CONCLUSION

For the above-stated reasons, the order appealed from should be reversed and the indictment dismissed; alternatively, there should be a remand for a hearing on the character of the prosecutor's acts.

Respectfully submitted,

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United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 75-1412

UNITED STATES OF AMERICA

Appellee

v.

JOHN CAPUTO

Appellant

AFFIDAVIT OF SERVICE BY MAIL

Stephen Zedalis _____, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 47-19 194th Street
Flushing, N.Y.

That on the 2nd day of February, 1976, deponent served the within Brief and Appendix for Appellant upon Richard Romero, Esq.
c/o George Gelinski; P.O.Box 899
Benjamin Franklin Station, Washington, D.C. 20044

Attorney(s) for the Appellee in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,

This 2nd day of February 1976

William J. Bachman

WILLIAM J. BACHMAN
Notary Public, State of New York
N. 30-5137735
Qualified in Nassau County
Commission Expires March 30, 1976